Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1558

RICHARD BECK,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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INDEX

	Page
Opinion Below	1
Jurisdictional Statement	2
Questions Presented	2
Constitutional Provisions Involved	3
Statement of the Case	3
Reasons for Granting the Writ	5
Conclusion	8
Appendix A—(Opinion Below)	A-1
Appendix B—(Judgment Below)	A-12

CITATIONS

Cases

Almeida-Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 2535, 37 L.ed2d 596 (1973)	6
Cady v. Dombrowski, 413 U.S. 433, 93 S.Ct. 2523, 37 L.ed.2d 706 (1973)	6
Cardwell v. Lewis, — U.S. —, 94 S.Ct. 2464, 41 L.ed.2d 325 (1974)	5, 7
Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.ed. 543 (1935)	6
Cash v. Williams, 455 F.2d 1227 (6th Cir. 1972)	7

Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 25 L.ed.2d 419 (1970) 5, 6, 7

Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.ed.2d 564 (1971) 5, 7

Cooper v. California, 386 U.S. 58, 87 S.Ct. 788, 17 L.ed. 2d 730 (1970) 7

Harris v. United States, 390 U.S. 234, 88 S.Ct. 992, 19 L.ed.2d 1067 (1968) 7

United States v. Bradshaw, 490 F.2d 1097 (4th Cir. 1974) 6

United States v. Garay, 477 F.2d 1306 (5th Cir. 1973) .. 6, 7

United States v. Shye, 473 F.2d 1061 (6th Cir. 1973) .. 5, 6

United States v. United States District Court for the E.D. of Michigan, 407 U.S. 297, 92 S.Ct. 2125, 32 L.ed. 2d 752 (1972) 6

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To the United States Court of Appeals for the Sixth Circuit

The petitioner, Richard Beck, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit rendered in these proceedings on March 11, 1975, rehearing denied May 13, 1975.

OPINIONS BELOW

The district court rendered no formal opinion. The opinion of the Court of Appeals for the Sixth Circuit is set forth in Appendix A. infra, pp. A-1-A-11. Relevant court orders and memoranda appear in Appendix B, infra, p. A-12.

JURISDICTIONAL STATEMENT

The judgment of the Sixth Circuit Court of Appeals was entered on March 11, 1975. A timely petition for rehearing was denied on May 13, 1975 (Appendix B, infra, p. A-12). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner was convicted of violating the Hobbs Act, 18 U.S.C. § 1951 and the bank theft statute, 18 U.S.C. §§ 2, 2113(b). The Sixth Circuit reversed and vacated the Hobbs Act conviction and affirmed the bank theft count. Evidence essential to the Government's case was procured by federal and state agents as the fruit of an automobile search. Two separate aspects of the searches and seizures are discernible under the facts. The initial intrustion was made while the automobile was on a motel parking lot, after a significant period of surveillance. The second took place at a police lot under the guise of an inventorying operation. Under the circumstances, the following issues arise regarding petitioner's Fourth Amendment Rights:

A. Where law enforcement agents have assured themselves that the occupants of an automobile purportedly involved in a bank theft are no longer in the vicinity, and the practicalities of obtaining prior judicial review are ever present, is a subsequent warrantless search and seizure reconcilable with the Fourth Amendment?

B. Where law enforcement agents have safely secured the automobile in question after having it removed to a location of their choosing, can a warrantless search and seizure of the contents of a locked truck compartment be justified under the requirements of the Fourth Amendment?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effect, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

Petitioner was convicted of violating the Hobbs Act, 18 U.S.C. § 1951 (1970), and the bank theft statute, 18 U.S.C. §§ 2, 2113(b). Petitioner was sentenced to concurrent prison terms of twenty and ten years respectively on each count. The Court of Appeals for the Sixth Circuit reversed the Hobbs Act conviction and affirmed the bank theft conviction. A timely petition for rehearing was denied on May 13, 1975.

On December 29, 1972 approximately $50,000.00 was taken from the Frayser branch of the National Bank of Commerce in Memphis, Tennessee as the result of hoax perpetrated on James J. Sledge, the assistant vice president and manager of the Frayser branch. Mr. Sledge had been instructed by an anonymous phone caller that his wife and grandchildren were being held hostage, and that he was to obtain $50,000.00 in various denominations and deliver it to a given location where he would receive further instructions. At the designated location, the $50,000.00 was taken from Sledge's automobile. In point of fact, Mrs. Sledge and the grandchildren were totally unaware of any disturbance. (Tr. 13, 50-51, 85, 91, 336-339)

A customer of the bank followed Sledge to the drop-off location. There, the customer obtained the license number and gen-

eral description of the automobile purportedly containing the thieves. (Tr. pp. 244-253) Special agent Harcum of the FBI broadcasted the description of a late model Ford or Thunderbird to available law enforcement agencies and proceeded to ascertain the identity of the subscriber to the license plates. (Tr. 19a-24a, 32a, 37a)

Sergeant Pugh of the Memphis Police Department, while checking motels searching for the automobile, located the late model Thunderbird at approximately 2:40 p.m. or some four hours after the theft, parked in a Howard Johnson's Motel parking lot. (Tr. 33a-36a) Detective Wilkerson, who had accompanied Pugh, set up a physical surveillance of the auto while Pugh attempted to ascertain if the Thunderbird's occupants were within the area. The surveillance continued for about an hour until the officers had assured themselves that the occupants of the vehicle were not in the vicinity of the motel. (Tr. 33a-43a)

The car was locked, and Sgt. Pugh looked inside and saw a brown glove, a telephone book, a spiral notebook and a box of some kind of candy (Tr. p. 43a) Thereafter, Pugh took a coat hanger and unlocked the car door but did not open it. Somewhere in this sequence of events, officers from the Memphis Crime Scene Division arrived and proceeded to process the interior of the automobile. (Tr. 34a-39a) The search did not last long when it began to rain and the vehicle was towed away by the police. (Tr. 31a, 40a, 43a)

At the Armour Station lot the auto was permitted to dry for fingerprint processing, which was accomplished at approximately 6:00 p.m. that same day. (Tr. p. 44a) The trunk had yet to be opened.

The next morning the FBI and local officers returned with a locksmith and opened the trunk of the car. No law enforcement officer procured a search warrant. The personal effects contained in the trunk were inventoried and seized. (Tr. 48a-52a)

REASONS FOR GRANTING THE WRIT

The facts herein clearly raise the question of whether evidence seized pursuant to repeated warrantless automobile searches is admissible against Petitioner where the practicalities of obtaining prior judicial review are present. The Sixth Circuit answered that question in the affirmative (No. 74-1704) — F.2d — (Sixth Cir. 1975), upon the reasoning that probable cause justified the initial intrusion. Reliance at least in part was made upon *United States v. Shye*, 473 F.2d 1061 (Sixth Cir. 1973). *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed2d 419 (1970) and *Cardwell v. Lewis*, — U.S. —, 94 S.Ct. 2464, 41 L.ed2d 325 (1974) were relied upon to support the premise that the subsequent search and seizure at the Armour Station lot was justifiable.

Review herein would serve to aid in the reconciliation of what appears to be conflicting principles emanating from *Coolidge v. New Hampshire*, 403 T.S. 443, 91 S.Ct. 2022, 29 L.Ed2d 564 (1971) and *Chambers v. Maroney*, supra, in the present factual setting. The public interest and general importance would clearly be served.

The issue is raised assuming arguendo, that the initial intrusion was justified, whether a subsequent warrantless search and seizure from a locked compartment of the vehicle is lawful in light of very distinct practicalities for obtaining prior judicial review? The Sixth Circuit reasoned that the principles of *Chambers*, supra, obtained and justified this later more methodical intrusion.

It is submitted that the public importance of adding clarity and alaying conflict in the law is evident and that the decision below was in error.

First: *Coolidge v. New Hampshire*, supra held that where law enforcement agents are in possession of probable cause and

intend to seize a particular item, a warrant is a necessary prerequisite. The practicalities of obtaining a search warrant reemerged as the guiding principle which is determinitive of the reasonableness of a warrantless search and seizure.

Here the Memphis police (and the FBI) were armed with probable cause and fully intended to seize and search the Thunderbird. They, however, first allowed whatever exigencies existing due to the unknown location of the suspect or suspects to dissipate at least in so far as the automobile was concerned. The marvels of modern communications left the police with merely an inconvenience so far as complying with the warrant requirement was concerned.

Substantial questions are raised in regard to the obvious public interest in efficient law enforcement and the preservation of civil liberties. *United States v. United States District Court for E.D. of Michigan*, 407 U.S. 297, 92 S. Ct. 2125, 32 L. Ed2d 752, and *Almeida-Sanchez v. United States*, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed2d 596 (1973) would lead us to believe that the preservation of individual rights is the more important consideration. *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973) and its progeny would lead to the opposite conclusion.

Various circuits have further confused the status of the law of search and seizure. *United States v. Bradshaw*, 490 F.2d 1097 (Fourth Cir. 1974); *United States v. Garay*, 477 F.2d 1306 (Fifth Cir. 1973). The Sixth Circuit herein has accentuated the controversies. See also *United States v. Shye*, 473 F.2d 1061 (1973).

Second: *Chambers v. Maroney*, supra, relied upon below, made it clear that where the initial intrusion was justified, the search can be continued and expanded at some other location. From *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69

L.Ed. 543 (1975) the recognition of the uniqueness of the automobile predictably points to the result of *Chambers*, supra. See also *Harris v. United States*, 396 U.S. 234, 88 S.Ct. 992, 19 L. Ed2d 1067 (1968).

Assuming arguendo, that the initial intrusion by the Memphis police was lawful, it does not follow that the more methodical subsequent search and seizure is therefore legitimated automatically. *United States v. Garay*, supra. Unlike *Cardwell v. Lewis*, — U.S. —, 94 S.Ct. 2464, 41 L.Ed2d 325 (1974), personal effects in a locked trunk compartment were here seized some twelve hours after the seizure of the automobile. *Cash v. Williams*, 455 F.2d 1227 (1972). Such delay does not comport with the Court's reasoning in *Coolidge*, supra.

Compliance with administrative regulations is not involved. *Cooper v. California*, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed2d 730 (1970). Nor can it be said that the search of the locked trunk followed from a legitimate need to protect the property of the suspects or the interests of the law enforcement agents. Discord otherwise arises with this Court's pronouncements in *Cooper*, supra, and *Harris*, supra.

No other case presents the factual context for the constitutional issues presented. Petitioner's situation lies squarely in the gap that exists between the Court's previous decisions regarding automobile searches. The general importance of the issues herein is evident.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted

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June 9, 1975

APPENDIX

APPENDIX A

No. 74-1704

United States Court of Appeals
For the Sixth Circuit

United States of America, Plaintiff-Appellee, v. Richard Beck, Defendant-Appellant.	Appeal from the United States District Court for the Western District of Tennessee, Western Division.

Opinion

(Decided and Filed March 11, 1975)

Before: Celebrezze, Peck and McCree, Circuit Judges.

Peck, Circuit Judge. Defendant-appellant ("appellant") was convicted at a jury trial in district court of violating the Hobbs Act, 18 U.S.C. § 1951 (1970),[1] and the bank theft

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[1] "(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both."

statute, 18 U.S.C. §§ 2, 2113(b) (1970).[2] The district judge sentenced appellant to concurrent prison terms of twenty and ten years on the Hobbs Act and bank theft convictions, respectively.

The convictions stemmed from the taking on December 29, 1972, of approximately $50,000 from the Frayser branch of the National Bank of Commerce in Memphis, Tennessee. James J. Sledge, an assistant vice-president and manager of the Frayser branch, testified that in mid-morning (approximately 10:45 a.m.) he received a telephone call warning that,

> "I have a little bad news for you this morning, your home is being watched and your wife and grandchildren are being held as hostage. . . . Everything will be all right if you will go ahead and follow my instructions. My instructions are to get up fifty thousand dollars in hundreds, twenties and tens and deliver them to me. . . ." Trial Transcript at 50.[3]

Sledge testified that he then told his head teller to "fix me up" a cloth bag containing $50,000 and that he parked his car

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[2] "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punished as a principal.

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." 18 U.S.C. § 2 (1970).

"Whoever takes or carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both." 18 U.S.C. § 2113(b) (1970).

[3] Sledge's wife and grandchildren were never harmed and, in fact, were never held hostage. The telephone line to Sledge's residence, however, had been cut preventing Sledge from contacting them and evoking alarm in Sledge in light of the caller's admonition that "[f]orty-five [seconds] after I hang up you can call your home and see if you can get through." Trial Transcript at 50.

containing the bag in a certain parking lot. A bank customer, "ha[ving] an idea something was wrong because two [bank employees] were in tears, . . . and [because Sledge] had a worried look on him," followed Sledge in his automobile away from the branch and parked near Sledge's automobile in the parking lot. Then Sledge, as instructed, went from his automobile to a pay telephone booth from where he was unable to see his automobile. From his truck, however, the customer saw a man open the door of Sledge's automobile and remove the bag. The customer then followed that man and the person driving that man from the parking lot, eventually "get[ting] up close enough to get the[ir] license number" before they sped away from him.

Less than four hours later (approximately 2:40 p.m.), Memphis police located a locked automobile in a motel parking lot with license plates matching those that the customer had written down and approximating the description of the automobile the customer had trailed. Authorities discovered that no motel guest had registered the automobile, that the automobile was registered to a Shirley Mueller, of St. Louis, Missouri, that her husband, Lester Henry Mueller, Jr.,[4] was suspected in a similar bank extortion in Missouri, that a Lester "Milner" had registered at the motel, and that "Milner" gave the motel a non-existent St. Louis address and an incorrect automobile license number. The police then summoned certain investigators who began to "work the vehicle." Because of rain the car was towed shortly thereafter (approximately 5:10 p.m.) to a police impound lot where the processing, including a search of the trunk of the automobile, was completed.

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[4] The grand jury on January 8, 1973, indicted Mueller and appellant on charges of violating the Hobbs Act and the bank theft statute. Mueller, however, was never tried, having been slain in Clayton, Missouri, on May 28, 1973. Trial commenced on July 9, 1973.

Of the four errors appellant claims on appeal, we find one to be meritorious. Consequently, we vacate the Hobbs Act conviction; we affirm the bank theft conviction.

THE HOBBS ACT VIOLATION

First, appellant claims that convicting him of violating the Hobbs Act and the bank theft statute violated the double jeopardy and cruel and unusual punishment clauses and the specialty and multiplicity doctrines. Although two circuits, including this one, have applied the Hobbs Act to the extortion of bank assets, *Stout v. United States*, — F.2d —, No. 74-1036 (6th Cir., filed January 10, 1975), *United States v. Grieser*, 502 F.2d 1295 (9th Cir. 1974), the applicability of the Hobbs Act seems to have been assumed rather than examined. *Stout*, in fact, concerned the voluntariness of a guilty plea and involved the applicability of the Hobbs Act only tangentially. Moreover, while courts have broadly construed the Hobbs Act, see, e.g., *United States v. Gill*, 490 F.2d 233 (7th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974) (police extortion from tavern in exchange for "overlooking" certain liquor violations), *United States v. Mitchell*, 463 F.2d 187, 193 (8th Cir. 1972), *cert. denied*, 410 U.S. 969 (1973) (militant civil rights activity), *United States v. Pranno*, 385 F.2d 387, 389 (7th Cir. 1967), *cert. denied*, 390 U.S. 944, 972 (1968) (politicians' threat to withhold building permit unless $20,000 paid), we remain unpersuaded that the Hobbs Act was designed to reach, or reaches, the extortion of bank assets, having been intended to curb labor racketeering. See *United States v. Franks*, Nos. 73-2157, -2158, -2159, -2160, 74-1138 (6th Cir., filed Feb. 12, 1975). However, we need not here consider the applicability of the Hobbs Act, since we conclude that the Hobbs Act conviction was improper because the bank theft statute, being "a comprehensive scheme for prosecuting and punishing persons who rob federally-insured

banks," was intended to exclusively proscribe conduct within its "coverage." *United States v. Canty*, 469 F.2d 114, 127-129 (D.C. Cir. 1972).

United States v. Marx, 485 F.2d 1179 (10th Cir. 1973), *cert. denied*, 94 S.Ct. 2391 (1974), which involved strikingly similar extortion of bank assets, established that the bank theft statute proscribes such conduct. We recognize that this (*Stout, supra*) and the Ninth (*Grieser, supra*) circuits have applied the Hobbs Act to the extortion, or attempted extortion, of bank assets, but no case has yet addressed the exclusivity of the bank theft statute in reference to the Hobbs Act. Stout and Grieser were convicted *only* of violating the Hobbs Act.

Like the *Canty* court, however, we are of the view that, in appropriate circumstances and under additional facts, a bank robber can be convicted of and sentenced, even consecutively, for a section 2113 ("Bank Robbery and incidental crimes") and another violation. For example, had appellant been a convicted felon and used certain firearms, 18 U.S.C. App. § 1202(a) (1970), in obtaining the bank's monies, he could be convicted of and sentenced, even consecutively, for such firearms and bank theft violations. In the present situation, however, the Hobbs Act conviction cannot stand because precisely the same facts which permit judicial notice of the interstate nature of a national bank's operations, without addition or modification, provide the basis for it and a conviction under section 2113.

Although the Hobbs Act conviction cannot stand, we uphold the bank theft conviction because we find no prejudice in appellant's being tried on both charges rather than being tried on the bank theft charge alone. Joining the Hobbs Act charge resulted in the admission of no prejudicial evidence that would have been inadmissible at a trial on charges of violating

only the bank theft statute. *Canty, supra,* at 129. See *Prince v. United States,* 352 U.S. 322, 329 (1957); *United States v. Faleafine,* 492 F.2d 18, 26 (9th Cir. 1974); *Marx, supra,* at 1186. See also *Rutkowski v. United States,* 149 F.2d 481, 483 (6th Cir. 1945).

THE SEARCH AND SEIZURE ISSUES

Second, appellant urges that the warrantless seizure and multiple searches of the automobile violated the Fourth Amendment, requiring the suppression as evidence of the items uncovered in the searches. Even if the seizure and searches were otherwise proper, appellant claims that the admission of his spiral notebook and its contents violated his Fourth Amendment right of privacy with regard to personal papers and his Fifth Amendment privilege against self-incrimination.

Even assuming that appellant has standing to assert improper searches and seizure,[5] the warrantless seizure and searches were "reasonable" under the circumstances and, thus, lawful. Similarly, we find no error in admitting the spiral notebook.

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[5] Though the government has claimed that appellant, being neither the owner of the automobile nor present during the search, lacks standing, recent case law portends finding such standing in appellant. In *Cash v. Williams,* 455 F.2d 1227, 1229 (6th Cir. 1972), this court flatly said that "[i]n order to establish standing to contest a search, a defendant must show that he owned or possessed the seized property *or* that he had a possessory interest in or was present at the premises searched" (emphasis in originals). Moreover, in *United States v. Hearn,* 496 F.2d 236, 240-241 (6th Cir.), *cert. denied,* 95 S.Ct. 622 (1974), for example, in finding no standing, this court pointed out that the defendant asserting the unlawful search claimed no interest in the seized property. Similarly, *Brown v. United States,* 411 U.S. 223 (1973), *aff'g* 452 F.2d 868 (6th Cir. 1971), though finding no standing, four times noted that the party asserting the unlawful search claimed "no proprietary or possessory interest . . . in the goods seized . . . ., nor was any evidence of such an interest presented." 411 U.S. at 225-226, 228, 229-230. Because we assume standing, it is unnecessary to determine whether appellant, in fact, sufficiently asserted a "proprietary or possessory interest in the goods seized."

This court[6] and the Supreme Court[7] have often dealt with the lawfulness of warrantless searches and seizures of automobiles. Though "reasonable" warrantless searches are rare, *Cash v. Williams,* 455 F.2d 1227, 1231-1232 (6th Cir. 1972), probable cause that an automobile contains evidence or fruits of a crime plus "exigent circumstances" invariably justify the warrantlessness of a search or seizure of the automobile. Here, because direct evidence established that the automobile was used in obtaining the bag from Sledge's automobile and because it was improperly registered at the motel, appellant neither argues nor could argue that there was no probable cause. Appellant does argue, however, that no exigent circumstances excused the government's failure to obtain a warrant. Admittedly, probable cause alone can never justify a warrantless search or seizure, *United States v. Lewis,* 504 F.2d 92, 100 (6th Cir. 1974). Like *United States v. Shye,* 473 F.2d 1061 (6th Cir. 1973), however, exigent circumstances existed in that the searches and seizure occurred within hours of the taking of the bag and in that the thieves were still at large and the stolen property was unrecovered. The cases appellant has cited and the cases in this circuit invalidating warrantless automobile searches because exigent circumstances were absent have involved a search or seizure either several days after the crime, *Coolidge v. New Hampshire,* 403 U.S. 443 (1971) (more than one month), *Lewis v. Cardwell,* 476 F.2d 467 (6th Cir. 1973),

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[6] E.g., *United States v. Upthegrove,* 504 F.2d 682 (6th Cir. 1974); *United States v. Lewis,* 504 F.2d 92 (6th Cir. 1974); *United States v. Kemper,* 503 F.2d 327 (6th Cir. 1974); *United States v. Isham,* 501 F.2d 989 (6th Cir. 1974); *United States v. Bush,* 500 F.2d 19 (6th Cir. 1974); *United States v. Shye,* 473 F.2d 1061 (6th Cir. 1973); *Cook v. Johnson,* 459 F.2d 473 (6th Cir. 1972); *Cash v. Williams,* 455 F.2d 1227 (6th Cir. 1972).

[7] E.g., *Cardwell v. Lewis,* 94 S. Ct. 2464 (1974), *rev'g* 476 F.2d 467 (6th Cir. 1973); *Coolidge v. New Hampshire,* 403 U.S. 443, 458-464 (1971); *Chambers v. Maroney,* 399 U.S. 42 (1970); *Cooper v. California,* 386 U.S. 835 (1967); *Preston v. United States,* 376 U.S. 364 (1964); *Brinegar v. United States,* 338 U.S. 160 (1949); *Carroll v. United States,* 267 U.S. 132 (1925).

rev'd on other grounds, 94 S. Ct. 2464 (1974) (more than two months), *Cook v. Johnson*, 459 F.2d 473 (6th Cir. 1972) (four days), where the suspected culprit has been arrested and jailed, *Kaufman v. United States*, 453 F.2d 798, 802-803 (8th Cir. 1971), where the stolen "property" has been recovered, *Cook, supra*, where the police could properly retain custody of the automobile on another basis pending issuance of a warrant, *Cash, supra*, at 1231, or where the facts underlying the search and seizure were available to the law officers prior to beginning their investigative work, see *United States v. Fullmer*, 457 F.2d 447 (7th Cir. 1972). But see *Lewis v. Cardwell*, 94 S. Ct. 2464, 2472 (1974).

We again hold, as has the Supreme Court, that a warrant to authorize the further search of the automobile at the impound lot was not required. *Cardwell, supra*, at 2470-2472; *Chambers v. Maroney*, 399 U.S. 42, 51-52 (1970); *United States v. Isham*, 401 F.2d 989, 991 (1974).

Appellant's further contention that, even if the warrantless searches and seizure of the automobile were proper, the admission of his spiral notebook was nonetheless improper, stems from Supreme Court dictum. In *Boyd v. United States*, 116 U.S. 616, 633 (1886), which involved an order to produce evidence, the Court in dictum went on to confess its inability "to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." Accord, *Gouled v. United States*, 255 U.S. 298, 306 (1921). More recently, although *Warden v. Hayden*, 387 U.S. 294, 303 (1967), abolished the "mere evidence" rule, the Court noted that "[t]his case does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure." We, however, find that admitting the spiral notebook, on these facts, violated neither the Fourth nor Fifth Amendments.

Admitting properly seized "personal papers" cannot violate the Fifth Amendment privilege against self-incrimination. Unlike an order which "compels" production of evidence, *Boyd, supra*, at 618, the owner of a notebook uncovered in a search in his absence is under no compulsion. See *United States v. Blank*, 459 F.2d 383, 385 (6th Cir. 1972), *rev'g* 330 F. Supp. 783 (N. D. Ohio 1971); *United States v. Murray*, 492 F.2d 178, 191 (9th Cir. 1973); *United States v. Scharfman*, 448 F.2d 1352, 1355 (2d Cir. 1971), *cert. denied*, 405 U.S. 919 (1972). But see *Hill v. Philpott*, 445 F.2d 144 (7th Cir. 1971). Being unaware of the search, he has no choice. Comment, The Search and Seizure of Private Papers: Fourth and Fifth Amendment Considerations, 6 Loyola (Cal.) L. Rev. 274, 290n.93 (1973). *Couch v. United States*, 409 U.S. 322, 327-336 (1973), established that mandated cooperation, rather than the "privacy" of the owned papers, is the *sine qua non* of the privilege against self-incrimination. See Comment, The Protection of Privacy by the Privilege Against Self-Incrimination: a Doctrine Laid to Rest?, 59 Iowa L. Rev. 1336 (1974). Similarly, though "testimonial" evidence was seized in *United States v. White*, 401 U.S. 745 (1971), the Court sustained the admission of such uncompelled evidence without feeling even the need to discuss the privilege against self-incrimination.

Though the overall search and seizure is proper and though there is no compelled cooperation, the search and seizure of the papers must also be "reasonable." As the Second Circuit so aptly said,

> "The reason why we shrink from allowing a personal diary to be the object of a search is that the entire diary must be read to discover whether there are incriminating entries; most of us would feel rather differently with respect to a 'diary' whose cover page bore the title 'Robberies I have Performed.' Similarly the adhorrence generally felt

with respect to 'rummaging' through the contents of a desk to find an incriminating letter would not exist in the same measure if the letter were lying in plain view." *United States v. Bennett*, 409 F.2d 888, 897 (2d Cir.), *cert. denied sub. nom., Haywood v. United States*, 396 U.S. 852 (1969), *Thomas v. United States*, 402 U.S. 984 (1971).

The "search" of the spiral notebook for its communicative value and for fingerprints, see *United States v. Hill*, 454 F.2d 282 (9th Cir. 1972), under the present circumstances, was hardly unreasonable in that, as in *Bennett*, there was no extensive "rummaging." Though appellate counsel has characterized the notebook as appellant's "private diary" (Appellant's Reply Brief at 22), the "diary" consisted of just one page, the first page, in fact, of the notebook. *United States v. Gargotto*, No. 74-1041 (6th Cir., filed Nov. 19, 1974), sustained the reasonableness of a search involving much greater "rummaging." Cf. *Philpott, supra* (more than thirty cartons of records seized); *United States v. Zive*, 299 F.Supp. 1273 (S.D.N.Y. 1973) (at least seven desk or file drawers).

THE INSTRUCTIONS TO THE JURY

Third, appellant claims that the district judge erred in charging the jury that it could convict appellant if the bank's money was "taken *or* carried away." Assuming that the instruction were error and even "plain error," Fed. R. Crim. P. 52(b), in light of appellant's failure to object to it,[8] it certainly was harmless. Neither appellant nor the evidence suggests the possibility that money was taken, but not carried away, or carried away, but not taken. *Marx, supra*, at 1185; *McDonnell v. United States*, 472 F.

[8] Though defense counsel objected to two other aspects of the jury instructions, he failed to object to the "take *or* carry away" aspect. Objections to the Charge 3-5.

2d 1153, 1156-57 (8th Cir.), *cert. denied*, 412 U.S. 942 (1973); *United States v. Jacquillon*, 469 F.2d 380, 386 (5th Cir. 1972), *cert. denied*, 410 U.S. 938 (1973).

THE SUFFICIENCY OF THE EVIDENCE

Fourth, appellant claims insufficient evidence was received to establish that the money was actually placed in the bag, that even if money were so placed that it was the bank's money, and that he was involved in the taking of the money. However, as hereinabove stated branch manager Sledge testified that he "went to [his] head teller, Mrs. McMillan, and told her to fix me up fifty thousand dollars in a cloth bag," and that she "immediately, on my instructions, went to the vault and fixed up the money." Trial Transcript 82. Moreover, his secretary testified that "we" went to the vault "to get the money." Trial Transcript at 20-21. Although Mrs. McMillan never testified,[9] viewing the evidence and reasonable inferences therefrom in the light most favorable to the government, *United States v. Hearn*, 496 F.2d 236, 237 (6th Cir.), *cert. denied*, 95 S.Ct. 622 (1974), we find sufficient evidence that money belonging to the bank was placed in the bag. We consider the evidence that appellant was involved in obtaining the money to be overwhelming.

The conviction of violating the bank theft statute is affirmed; the conviction of violating the Hobbs Act is vacated.

[9] On oral argument in this court, government counsel explained that, although Mrs. McMillan had been scheduled to testify, she was never called because it was "thought unnecessary." The trial transcript reflects the government's aim at facilitating the advance of the trial.

> "[THE COURT: Y]ou made an eariler estimate of seventy witnesses.
>
> "[THE PROSECUTOR]: I have been paring on it, if the Court please, and have pared it down as best I can to approximately forty-five at this time." Trial Transcript at 67.

APPENDIX B

No. 74-1704

United States Court of Appeals
For the Sixth Circuit

United States of America
Plaintiff-Appellee

v.

Richard Beck
Defendant-Appellant

ORDER

(Filed May 13, 1975)

Before: Celebrezze, Peck and McCree, Circuit Judges.

Petitioner-appellant's petition for rehearing having come on to be considered and of the judges of this Court who are in regular active service less than a majority having favored ordering consideration en banc, the petition has been referred to the panel which heard the appeal, and it further appearing that the petition for rehearing is without merit,

It Is Ordered that the petition be, and it hereby is denied.

Entered by Order of the Court

JOHN P. HELMAN
Clerk

Supreme Court, U. S.
F I L E D
AUG 20 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1558

RICHARD BECK,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S SUPPLEMENTAL MEMORANDUM

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INDEX

	Page
Memorandum	1
Appendix	A-1

IN THE

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S SUPPLEMENTAL MEMORANDUM

MEMORANDUM

In the petition, we had presented the conflict among the Circuits, and with the pronouncements of this Court in related cases, and the reasoning of the Sixth Circuit herein. (Pet. 5, 6, 7). Subsequent to the filing of the petition the District of Columbia Circuit had occasion to consider virtually identical facts surrounding a warrantless search of an unoccupied motor vehicle.

United States v. Bradshaw, 515 F2d 360 (decided June 30, 1975). The D.C. Circuit adopted a position in direct conflict with the Sixth Circuit, drawing a crucial distincton between occupied and unoccupied vehicles. For the convenience of the Court, we set forth in the Appendix pp. A-1-A-14, infra, the District of Columbia Circuit's opinion in that case.

Respectfully submitted

DANIEL V. O'BRIEN
1250 Big Bend Boulevard
St. Louis, Missouri 63117
Area Code 314 644-3366
Attorney for Petitioner

APPENDIX

UNITED STATES of AMERICA, Appellant,

v.

Michael J. BRADSHAW and Vance E. Robinson, Appellee.

No. 74-1778.

United States Court of Appeals, District of Columbia Circuit.

Argued Oct. 25, 1974.

Decided June 30, 1975.

An order of the United States District Court for the District of Columbia, Joseph C. Waddy, J., suppressed certain items seized by metropolitan police without a warrant from a parked and occupantless automobile which had allegedly been used as a getaway car in a bank robbery. The government appealed. The Court of Appeals, Merhige, District Judge, held that under circumstances, including the fact that the search occurred on the morning of a business day when courts were open and judicial officers were readily available and the fact that there were three to ten police officers in the area, the trial court's finding that there were no exigent circumstances to justify the warrantless search was not clearly erroneous.

Affirmed.

1. Searches and Seizures key 7(5)

Though relaxation of certain Fourth Amendment standards has been permitted in context of automobile searches and seizures, the probable cause, neutral magistrate and warrant requirements still have force in context of such a search. U.S.C.A. Const. Amend. 4.

2. Searches and Seizures key 7(10)

When obtaining a warrant would unreasonably impair police efficiency by precluding seizing of "fleeting instant" or else unreasonably burden effective law enforcement by requiring expenditure of valuable resources in immobilizing and watching a vehicle, Fourth Amendment countenances exception to warrant requirement. U.S.C.A.Const. Amend. 4.

3. Searches and Seizures key 7(10)

Rule of reason embodied in Fourth Amendment is flexible enough to permit police officer with probable cause to search an unoccupied automobile when prospect of mobility and burden on resources occasioned by immobilizing the automobile and posting guard to watch it create an emergency circumstance or aggravate an already existing emergency. U.S.C.A. Const. Amend. 4.

4. Searches and Seizures key 7(10)

If there is no extrinsic emergency arising out of factual situation facing law enforcement officers, or if threat of mobility and prospect of unreasonable burden on resources do not in themselves create exigency, then, even when there is probable cause, Fourth Amendment mandates that police obtain warrant before conducting search of an unoccupied automobile. U.S.C.A. Const. Amend. 4.

5. Criminal Law key 1158(2)

Court of Appeals was not free to set aside trial court's finding, that there was no exigency rendering it impracticable for police to obtain warrant before searching unoccupied automobile, unless record revealed trial court's view of facts to be

clearly erroneous, and where review of record and briefs did not leave Court of Appeals with definite and firm conviction that mistake had been committed, trial court's finding was affirmed. Fed.Rules Civ.Proc. rule 52(a), 28 U.S.C.A.; U.S.C.A. Const.Amend. 4.

6. Searches and Seizures key 3.3(1)

Under circumstances, including fact that search of unoccupied automobile occurred on morning of business day when courts were open and judicial officers were readily available and fact that there were three to ten police officers in area, trial court's finding that there were no exigent circumstances to justify warrantless search was not clearly erroneous. U.S.C.A. Const.Amend. 4; Fed.Rules Civ.Proc. rule 52(a), 28 U.S.C.A.

Appeal from the United States District Court for the District of Columbia (D.C. Criminal 239-74).

Jeffrey T. Demerath, Asst. U. S. Atty., with whom Earl J. Silbert, U. S. Atty., John A. Terry, James F. Rutherford, and James F. McMullin, Asst. U. S. Attys., were on the brief for appellant.

Theodore J. Christensen, Washington, D. C. (appointed by this Court), for appellee Robinson.

Before BAZELON, Chief Judge, WRIGHT, Circuit Judge, and MERHIGE,* United States District Judge for the Eastern District of Virginia.

Opinion for the Court filed by District Judge MERHIGE.

MERHIGE, District Judge.

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* Sitting by designation pursuant to 28 U.S.C. § 292(d).

The Government appeals from the District Court's order suppressing certain items—guns, money, clothing and other relevant items—seized by the metropolitan police without a warrant from a parked and occupantless car that had allegedly been used by appellee Robinson as the getaway car in a bank robbery. We conclude that the District Court was not clearly erroneous and affirm.

I

On the 21st of March, 1974, at about 11:15 a.m., a branch of the American Security & Trust Company, a federally insured institution, located at 822 East Capitol Street, N.E., Washington, D. C., was robbed by four black males. Moments later a witness, Ms. Eleanor Leary, who was in the process of parking her car near the intersection of 8th and A Streets, observed four black men trotting north on 8th Street in her direction. Two of them got into a two-toned tan luxury automobile (later identified as a Cadillac Eldorado) and departed the scene; one crossed the street and fled in a second vehicle; and the fourth continued his flight on foot. Alerted by the siren from a passing police car, Ms. Leary approached two policemen who had arrived on the scene and told them what she had seen. The police in turn relayed her information to the police communications office via their squad car radio. The officers next escorted Ms. Leary to the bank premises where she talked with several investigating detectives and then took her home.

At approximately 11:20 a. m., officers Schlueter and Perkins, who were on routine patrol at the intersection of 6th and K Streets, N. E., received a flash message over their squad car radio directing them to be on the lookout for a "tan luxury auto occupied by two Negro males, last seen heading north on 8th Street, N.E." The officers were told that the car was wanted in connection with a possible bank robbery. Almost simultaneously, the officers saw Robinson's tan Eldorado Cadillac pass in the opposite lane heading north. The officers turned their marked squad car around and followed the Eldorado to 7th and Orleans Streets where it pulled over to the left curb of the street and came to a halt. It was raining very hard that day and the two suspects remained in the Eldorado for a few moments before alighting. Robinson, the driver, got out, looked over at the officers, smiled at them and then reached into the back seat to get a coat which he put on. Robinson and the passenger, who had no coat, then began walking south toward Morton Place, N.E., where they met a third person. Robinson and this third person walked into a house at 1111 7th Street, while the passenger continued walking down Morton Place.

After the two suspects had departed, Officers Schlueter and Perkins drove around the block and came up behind the Eldorado where they noticed a cable wire hanging from the trunk, which they took to be indicative of the trunk having been closed in a hurry, so they decided to take a closer look. When they looked through a window of the Eldorado, they saw a bundle of clothing with a blue coat on top beneath the passenger seat. At some point they tried to open the doors of the Eldorado but found that they were locked. Thinking it odd that the passenger had walked out into a heavy rain without putting on a coat, they called for assistance, and parked in a nearby alley where they could keep the car in sight.

Within fifteen minutes, a Detective Fontana and several others arrived at the location of the vehicle. Detective Fontana testified that when he arrived there were "about ten" police officers in the vicinity of the car. (Tr. 14) Meanwhile, a Detective Kaclik and an F.B.I. agent picked up Ms. Leary at her home and drove her to Orleans Place where she positively identified the Eldorado as one she had seen earlier. This identification was made approximately forty-five to fifty-five minutes after the robbery. (*Compare* Tr. 18 *with* Tr. 107). Officer Fontana then called a Mo-

bile Crime Lab for assistance in opening the vehicle. After the arrival of the Mobile Crime Lab, Detective Fontana did not call on the crime lab technician to open the doors of the vehicle, but enlisted instead the aid of a young passer-by and paid him a dollar to reach through a partially open window of the car and lift the lock. With the car unlocked,[1] Officer Alford of the Mobile Crime Lab conducted a search of the passenger section and found money and a revolver beneath the front seat. The car was then taken to the Fifth District headquarters where the police opened the trunk and found a carbine, money and a large purse-type bag similar to one carried by the bank robbers. During his search of the car, Officer Alford discovered a registered letter bearing Robinson's name and a nearby address. Police officers went immediately to this address but found the apartment empty.

In an eight count indictment filed May 2, 1974, Robinson and a co-defendant were charged with armed bank robbery, bank robbery, armed robbery, robbery, assault with a dangerous weapon, and Robinson was additionally charged with two counts of carrying a dangerous weapon. Subsequently, on May 17, 1974, Robinson filed a motion to suppress the fruits of the automobile search.

On the basis of the facts just recounted, the District Court, after hearings held on June 21 and 24, 1974, granted Robinson's motion to suppress the evidence. While finding probable cause to search it, nevertheless held the Government had failed to prove sufficient exigency to justify the failure of the police to obtain a search warrant and suppressed the fruits of the automobile search.

---

[1] The Eldorado was unlocked fifteen minutes after Ms. Leary's positive identification. (Tr. 22).

II

[1] We start from the premise that law enforcement officers in order to obtain legal validation of their efforts must still comply with the requirements of the Fourth Amendment when conducting a search of an automobile. While the Supreme Court has permitted a relaxation of certain Fourth Amendment standards in the context of automobile searches and seizures, see Cardwell v. Lewis, 417 U.S. 583, 589-90, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974), the probable cause, neutral magistrate and warrant requirements still have force in the context of such a search. There is no case which establishes the proposition that law enforcement officers in "every conceivable circumstance" may dispense with the warrant requirement in the context of an automobile search. Chambers v. Maroney, 399 U.S. 42, 50, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970). "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." Coolidge v. New Hampshire, 403 U.S. 443, 461-62, 91 S.Ct. 2022, 2035, 29 L.Ed.2d 564 (1971). Indeed, the Government concedes as much. Appellant's Brief at 9.

[2] Nevertheless, the Fourth Amendment requirements have been relaxed somewhat in the specific situation where the police have probable cause to search a stopped automobile and circumstances make securing a warrant impracticable. The Court has endorsed this more permissive approach on two grounds. First, the cases delineate an "exigent circumstances" exception to the warrant requirement founded upon judicial awareness of an automobile's mobility and the often "fleeting" opportunity to conduct a search once probable cause has been obtained. Carroll v. United States, 267 U.S. 132, 153, 45 S.Ct. 280, 69 L.Ed. 543 (1925); Dyke v. Taylor Implement Co., 391 U.S. 216, 221, 88 S.Ct. 1472, 20 L.Ed.2d 538 (1968); Chambers v. Maroney, 399 U.S. 42, 51, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970). This Court has also recognized that it would often be unduly burdensome and unreasonably restrictive to require the police to post

a guard and repair to the courthouse for a warrant once they have probable cause to search. United States v. Free, 141 U.S. App.D.C. 198, 437 F.2d 631, 635 (1970). Hence, when obtainment of a warrant would unreasonably impair police efficiency by precluding the seizing of the "fleeting instant" or else unreasonably burden effective law enforcement by requiring the expenditure of valuable resources in immobilizing and watching a vehicle, the Fourth Amendment countenances an exception to the warrant requirement. Second, a different standard for automobiles has also been rationalized on the ground that individuals have a lessened expectation of privacy when traveling in autos—a car travels in plain view on public thoroughfares and "has little capability for escaping public scrutiny"—so that the search of an auto is far less intrusive than a search of a person or home. Cardwell v. Lewis, 417 U.S. 583, 590-91, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974) (Plurality opinion); United States v. Free, *supra*, at 635.

[3] Fourth Amendment considerations may also vary depending upon whether the car is occupied or unoccupied. In general the "exigency" exception has most often been associated with an occupied car stopped on a highway. See United States v. Free, *supra*. In Chambers v. Maroney, *supra*, the Court said:

> [Carroll v. United States] holds a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Hence an immediate search is constitutionally permissible. 399 U.S. at 51, 90 S.Ct. at 1981.

The rule of reason embodied in the Fourth Amendment, then, is flexible enough to permit a police officer with probable cause to search an occupied automobile when the prospect of mobility

and the burden on resources occasioned by immobilizing the automobile and posting a guard to watch it create an emergency circumstance or aggravate an already existing emergency.

[4] By contrast, the threat of mobility and the burden on law enforcement resources will oftentimes be less acute in the case of an unoccupied automobile which the police have probable cause to search. If there is no intrinsic emergency arising out of the factual situation facing the law enforcement officers, or if the threat of mobility and the prospect of unreasonable burden on resources do not in themselves create an exigency, then even where there is probable cause the Fourth Amendment mandates that the police obtain a warrant before they conduct a search of an unoccupied automobile. *See* Coolidge v. New Hampshire, 403 U.S. 443, 458-64, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) (plurality opinion). Mr. Chief Justice Taft in delivering the opinion of the Court in the case which created the so-called "automobile exception," Carroll v. United States, *supra*, recognized as much when he wrote that "[i]n cases where the securing of a warrant is reasonably practicable, it must be used . . ." 267 U.S. at 156, 45 S.Ct. at 286. *See* Coolidge v. New Hampshire, *supra*, 403 U.S. at 461-62, 91 S.Ct. 2022.

We deal today with the warrantless search of the interior of an unoccupied parked vehicle. The cases principally relied upon by the Government, United States v. Free, 141 U.S. App.D.C., 198, 437 F.2d 631 (1970) and Cardwell v. Lewis, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974), are not controlling. United States v. Free upheld a warrantless search of a stopped vehicle which followed immediately the arrest of the driver where the police had probable cause, based on the victim's identification of the driver as her assailant, to believe that the vehicle contained a weapon which had been used some 45 minutes earlier to perpetrate an armed assault and where prior to the search, the police had neither sufficient information for the issuance of a warrant nor the time to obtain a warrant once

probable cause had attached. Cardwell v. Lewis upheld the constitutional validity of a warrantless examination, made upon probable cause, of the *exterior* of a car previously impounded by the police. The evidence thus obtained was ". . . not the product of a 'search' that implicate[d] traditional considerations of the owner's privacy interest." 417 U.S. at 588-89, 94 S.Ct. at 2468. Hence, although Cardwell v. Lewis and United States v. Free provide benchmarks in the exposition of the law of the Fourth Amendment, they do not necessarily dictate the path we must follow today.

III

The questions of "exigency" and "practicability" of obtaining a warrant are dependent upon such variables as the mobility of the automobile, the burden upon law enforcement officers, and other facts and circumstances surrounding the warrantless search. In short, the answer to these questions depends upon factual determinations and the consequent application of legal categories like "exigency" to the initial findings of fact.

[5] The trial court correctly framed the issue in terms of exigency and practicability: did the exigency of the situation render it impracticable for the police to obtain a warrant before searching the automobile? Finding "no showing of exigent circumstances which would make it impracticable for the police to get a warrant prior to searching that car" (Tr. 279), the trial court suppressed the fruits of the search. On review we deal basically with a factual question. The trial court's finding of non-exigency was predicated upon its evaluation of the facts and circumstances surrounding the search. We are not free to set aside the trial court's finding unless the record reveals its view of the facts to be clearly erroneous. Rule 52(a), F.R.Civ.P. Since our review of the record and the briefs does not leave us "with the definite and firm conviction that a mistake has been committed," United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948), we affirm.

[6] The trial court found that, although probable cause may have attached, no emergency conditions existed at the time when the two suspects parked the Cadillac at the corner of Orleans and 7th Streets, exited, and proceeded to walk down 7th Street. (Tr. 279). Although officers Schlueter and Perkins followed the Cadillac to 7th and Orleans after receiving the radio message, they made no move to stop the suspects from leaving the area where the car was parked. The Court found that the Cadillac had been immobilized, presumably because the occupants had departed and a substantial force of police officers had arrived. There was no need then to effect an immediate warrantless search on the premise that the automobile might soon be driven from the area when the premise itself no longer comported with reality. Additionally, as the trial Court noted in colloquy with government counsel (Tr. 261), the robbery occurred in the late morning of a business day, and it would not have been difficult or time consuming to have obtained prior judicial approval before conducting the search. In sum, the Court saw no reason why the police could not have put the automobile under surveillance while they secured the warrant (Tr. 279), reasoning apparently that the police did not lack available manpower for such a task.

The Government contends, however, that the trial court's suppression order was clearly erroneous because it could have found exigent circumstances on any one of several grounds.

First, the Government asserts that the opportunity to search the tan automobile was "fleeting" and that the police therefore were justified in operating on a *carpé diem* principle. It was not "inconceivable," the Government argues, that the bank robbers could have returned and driven the vehicle away, or made a desperate attempt to destroy the incriminating evi-

dence. Alternatively, the vehicle could have been ransacked by vandals or persons acting for the bank robbers while the police were in the process of securing a warrant.

The Court must reject the Government's "fleeting" instant hypothesis. When Detective Fontana arrived at the scene, he found at least 10 police officers surrounding the car. Approximately 12 minutes later, a Mobile Crime Lab arrived at the scene. (*Compare* Tr. 18 *with* Tr. 23). The Court believes it indeed inconceivable that the two suspects could have wrested the car away from the sizeable force then guarding it. It is even more unlikely that they would have returned to attack the police officers in an attempt, which could only be described as foolhardy, to destroy the evidence. Finally, the Government's suggestion that the warrantless search was necessary to prevent the car from being ransacked by vandals or persons acting for the defendants must be characterized as fanciful in light of the number of law enforcement officers present in the immediate area.

Second, the Government raises the drain on resources argument: it contends that the exigency of the situation precluded the placing of a special detachment around the car because available police manpower was needed to search for the suspects and, consequently, the immediate search was necessary to preserve any evidence which might be in the auto. This argument has plausibility and would indeed support a warrantless search in the appropriate circumstances,[2] but there is absolutely no foundation for it in this record. Our reading of the record reveals that there were never less than three officers surrounding the car and at one period of time there were more than ten officers in the area.[3]

---

[2] See United States v. Free, *supra*, at 635.

[3] *Compare* Tr. 14 [*and*] Tr. 19 *with* Tr. 42. Even when approximately a half dozen officers had been dispatched to investigate the house which Robinson was seen entering, three officers were left to stake out the car. Tr. 42.

Third, the Government contends that a security detail would only prolong the period of time in which the police would be exposed to danger should the robbers attempt to recover their automobile. Again, this might provide a plausible rationale for a warrantless search in appropriate circumstances. There is, however, absolutely no evidence in the record that the police detail which first surrounded the Eldorado, then searched, and then examined the fruits of the search, was at any time exposed to danger, or that they ever thought themselves exposed to danger.

The Government in its brief misconstrues the functions of a reviewing Court. Our task is not to think of hypothetical situations which could conceivably justify the search in question, but to ascertain whether the trial judge was clearly wrong in its view of the relevant facts.

Our review of the record does not leave us with the definite and firm conviction that factual error has been committed. In conclusion we summarize the following facts and inferences supportive of the trial court's determination that no emergency existed and that the police could have moved expeditiously to have obtained a warrant had they so desired: (1) The trial court's inference, drawn from their behavior, that Officers Perkins and Schlueter did not think an emergency existed when they watched the suspects depart the Eldorado; (2) the fact that the number of police in the area appears never to have fallen below three and at one time exceeded ten; (3) the fact that there were at least three squad cars in the area when the witness, Ms. Leary, arrived to identify the Eldorado (See Tr. 82); (4) the capability of the police to move expeditiously when they so desired—they transported Ms. Leary to the bank, took her home, later returned to her house and picked her up, and drove her to the location of the Eldorado where she made the positive identification, all in the space of 45 to 55 minutes; (5) the fact that the police waited for 15 minutes after Ms. Leary's positive identification to conduct the search supports the conclusions that no emergency existed

and that there was surplus time which could have been used to secure a warrant: (6) the lack of any evidence in the record to support the Government's contentions that the police were in danger and that their available resources would have been unreasonably drained by application for a warrant; and (7) the fact that the robbery occurred on a Thursday morning when the courts were open and judicial officers readily available.

An order of affirmance will issue.

Supreme Court, U. S.
FILED
SEP 4 1975
MICHAEL RODAK, JR., CLERK

No. 74-1558

In the Supreme Court of the United States

OCTOBER TERM, 1975

RICHARD BECK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1558

RICHARD BECK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the warrantless search of an automobile, although conducted with probable cause, was unconstitutional.

Following a jury trial in the United States District Court for the Western District of Tennessee, petitioner was convicted of extortion, in violation of 18 U.S.C. 1951, and of bank larceny, in violation of 18 U.S.C. 2113(b). He was sentenced to a term of twenty years' imprisonment on the extortion count and ten years' imprisonment on the larceny count. The court of appeals affirmed the bank larceny conviction but reversed the extortion conviction (Pet. App. A).[1]

---

[1]In reversing the extortion conviction, the court of appeals held that 18 U.S.C. 2113 was " 'a comprehensive scheme for prosecuting and punishing persons who rob federally-insured banks' " and "was intended to exclusively proscribe conduct within its 'coverage' " (Pet. App. A4-A5).

1. On the morning of December 29, 1972, James Sledge, the manager of the Frayser (Tennessee) Branch of the National Bank of Commerce, received a telephone call from a man whose voice was similar to that of petitioner (Tr. 11-12, 18-19, 50, 137-139, 157, 162-163).[2] The caller told Sledge that Sledge's wife and grandchildren were being held hostage and demanded $50,000 (Tr. 50).[3] Sledge attempted to telephone his wife but did not get an answer because the line had been cut (Tr. 50, 335-336). Thereupon, Sledge gathered together $50,000, placed it in a white cloth sack, left the bank, and drove to a nearby telephone booth to await further instructions. Immediately upon his arrival at the phone booth, Sledge received another call and was instructed to drive to a shopping center, park his car in the lot and walk away, leaving the money on the front seat (Tr. 58, 82-85).

Meanwhile, John Dallosta, a bank customer, had noticed a worried Sledge leave the bank with a filled money bag and had followed him (Tr. 238-241, 244). Arriving at the shopping center, Dallosta parked near Sledge's vehicle and observed Sledge get out of his car without the money bag and walk out of sight (Tr. 242-243). Immediately thereafter, a man later identified as Lester Mueller approached Sledge's car and extracted the white bag (Tr. 227-229, 243-244, 252-253), and then walked to a 1973

[2]"H." refers to the reporter's transcript of the suppression hearing, while "Tr." refers to the trial transcript.

[3]As it developed, neither Mrs. Sledge nor the grandchildren were being held as hostages (Tr. 338).

blue Thunderbird with a black vinyl top, which was being driven by another man (Tr. 190-192). Dallosta followed the Thunderbird when it was driven off and was able to observe the license plate: Missouri number GB4021 (Tr. 192-193, 246-251).

Dallosta promptly relayed this information to law enforcement officers. Approximately two hours later, Memphis police located the blue Thunderbird in a motel parking lot and placed it under surveillance (H. 15). Further investigation revealed that no motel guest had registered the vehicle; that the vehicle was licensed in the name of a Shirley Mueller of St. Louis, Missouri; that her husband, Lester Mueller, was a suspect in a similar bank extortion scheme; that a "Lester Milner" of St. Louis had registered at the motel; and that "Milner" had given false information regarding his home address and automobile ownership when he registered (H. 17-19; Tr. 384-385).

A search of the motel failed to produce the occupants of the automobile (H. 42; Tr. 385). Officers then opened the Thunderbird and seized several items for fingerprint analysis (H. 37-38; Tr. 388-389, 407-412, 428), but it then began to rain and the car was towed to a police impoundment lot (H. 38). The following morning, the trunk was opened, and several items were seized (Tr. 460-466, 475).[4]

[4]Among the items seized were a candy box bearing petitioner's fingerprints, a notebook containing specimens of petitioner's handwriting, and a white hardhat similar to the one worn by the man who had cut the telephone lines at the Sledge residence on the morning of the extortion scheme (Tr. 342-345, 411, 463, 518-534, 822-839, 853-864).

2. Although conceding that the police officers acted with probable cause (Pet. 6), petitioner nevertheless contends that the search of another person's automobile was unconstitutional because it was conducted without a warrant.

Petitioner has no standing to contest the search of the Thunderbird. The vehicle did not belong to him but was registered to Shirley Mueller, the wife of Lester Mueller. Petitioner was not present at the time of the search, he has demonstrated no proprietary or possessory interest in the automobile, and he was not charged with an offense requiring possession. As this Court said in *Brown* v. *United States*, 411 U.S. 223, 229, there is no standing to contest a search and seizure when, as here, the petitioner

> (a) [was] not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) [was] not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure.

The recent decision of the Seventh Circuit in *United States* v. *Lisk*, No. 75-1033, decided July 2, 1975, provides a helpful analytical framework. In *Lisk*, as here, the defendant had no proprietary or possessory interest in the vehicle searched. The court therefore concluded that the violation of Fourth Amendment rights involved in the search of the car was "clearly not available to the defendant as a basis for suppressing evidence acquired thereby" (slip op., p. 3). For that reason, the court assumed that the defendant's rights were untouched by the search of the car and went on to consider the defendant's interest in the firearm seized from the car. Because it was stipulated in *Lisk* that the defendant had a proprietary interest in the firearm, the court concluded that the defendant had standing to object to its seizure. Then, putting aside the search of the car for analytical purposes (because the defendant had no standing to contest it), the court found that "as far as defendant is concerned the case is the same as though the firearm had been found in plain view in a public place and then seized" (*id.* at 3-4); accordingly, the court concluded that the defendant had failed to demonstrate "that the evidence should be suppressed on the ground that *his* Fourth Amendment rights were violated" (*id.* at 5).

Similarly, petitioner in this case has no standing to contest the search of the Thunderbird. Since his rights were untouched by the search, he is limited to a complaint about the seizure of items from the car, and he can prevail on that issue only if he can demonstrate both some interest in those items and that his Fourth Amendment rights were violated by their seizure. He has shown neither. In *Lisk*, there was a stipulation that the defendant had a proprietary interest in the firearm seized. *United States* v. *Lisk*, *supra*, slip op., at p. 2. Here, there is no indication whatsoever that petitioner had such an interest in the items seized from the Thunderbird. Having failed to testify at the suppression hearing in an effort to establish one, he has no standing to contest either the search of the Thunderbird or the seizure of items therefrom.

3. In his Supplemental Memorandum, petitioner correctly points out that the decision of the Sixth Circuit on the merits in the instant case conflicts with the recent decision of the United States Court of Appeals for the District of Columbia Circuit in *United States* v. *Bradshaw*, 515 F.2d 360. Because the decision in *Bradshaw* is in direct conflict with decisions of the Second, Sixth, Seventh and Ninth Circuits,[5] and because in our judgment it is

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[5]See *United States* v. *Ellis*, 461 F.2d 962 (C.A. 2), certiorari denied, 409 U.S. 866; *United States* v. *Shye*, 473 F.2d 1061 (C.A. 6); *United States* v. *Castaldi*, 453 F.2d 506 (C.A. 7), certiorari denied, 405 U.S. 992; *United States* v. *Connolly*, 479 F.2d 930 (C.A. 9), certiorari dismissed, 414 U.S. 897.

clearly wrong, the United States has filed a petition for rehearing and suggestion for rehearing *en banc*, which is now pending before the District of Columbia Circuit.[6] Should that court persist in its view of the law, it may well be appropriate for this Court to resolve the conflict among the circuits. The instant case is an inappropriate vehicle for such a resolution, however, because, as we have shown, petitioner lacks standing to contest the search and seizure.[7]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

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[6]Petitioner's reliance upon *United States* v. *Garay*, 477 F.2d 1306 (C.A. 5), is misplaced because that case did not involve the search of a private vehicle. Rather, after the defendant had been taken into custody, luggage belonging to him was seized from a common carrier and subjected to a warrantless search.

[7]Petitioner's argument, that this Court's decisions in *Coolidge* v. *New Hampshire*, 403 U.S. 443, and *Chambers* v. *Maroney*, 399 U.S. 427, are in conflict, is unconvincing. Rather, as this Court noted in *Cardwell* v. *Lewis*, 417 U.S. 583, 593, the *Coolidge* search was readily distinguishable from that in *Chambers* because the former entailed entry onto private property. See, also, *Cady* v. *Dombrowski*, 413 U.S. 433, ~~446~~ 447. Here, of course, the vehicle in question was parked in a public lot. Accordingly, petitioner's reliance on *United States* v. *Bradshaw*, 490 F.2d 1097 (C.A. 4), certiorari denied, 419 U.S. 895—which dealt with a warrantless search of an automobile parked on the defendant's property—is misplaced. Moreover, the Fourth Circuit has limited *Bradshaw* to the private property context in *Weaver* v. *Williams*, 509 F.2d 884, 886.

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-1558

RICHARD BECK,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for Writ of Certiorari to the Court of Appeals
for the Sixth Circuit

PETITIONER'S REPLY MEMORANDUM

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for the Sixth Circuit

PETITIONER'S REPLY MEMORANDUM

In its Memorandum in Opposition, the United States raises the issue of Petitioner's standing to object to an admittedly unconstitutional search and seizure.[1]

1. An essential issue at trial was the identification of Petitioner as the assistant of Lester Henry Mueller (Tr. Vol IX, pp. 1066-1069).[2] It was the Government's theory that Petitioner

[1] It should be noted that the United States has filed no timely brief in opposition pursuant to the requirements of Rule 24 (1).

[2] "Tr." refers to the trial transcript.

and Lester Mueller shared a common "business" interest in the automobile and its contents. This is evident from the use made of the personal effects seized from the Thunderbird automobile in the prosecution's attempts to forge its chain of circumstantial proof. (Tr. 460-477; Sup. Tr. 28-36).[3] It was asserted in the District Court that Petitioner had at minimum, a possessory interest in the automobile.[4] The Government cannot be now heard to say that the search and seizure were not direct against the Petitioner. As this Court said in *Jones v. United States*, 362 U.S. 257, 261:

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, *one against whom the search was directed*, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. Rule 41 (e) applies the general principle that a party will not be heard to claim a constitutional protection, unless he belongs to the class for whose sake the constitutional protection is given." (citations). The restrictions upon search and seizures *were* obviously designed for the protection against official invasion of privacy and the security of property." (Emphasis added)

A more recent discussion by this Court on the question of standing was in *United States v. Calandra*, 414 U.S. 338, 347 wherein it was decided that a grand jury witness had standing though the evidence may be used against someone else.

> "Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where it remedial objectives are thought most officaciously served. The balancing process implicit in this approach is expressed in the contours of the standing requirement. Thus, standing to invoke the exclusionary rule has been confined to situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search (Citations omitted). This standing rule is premised on a recognition that the need for deterrence and hence the rationale for excluding the evidence are strongest where the Governments unlawful conduct would result in imposition of a criminal sanction on the victim of the search."

[3] "Sup. Tr." refers to the Supplemental Trial Transcript containing the arguments of counsel.

[4] Note that *Brown v. United States*, 411 U.S. 223, involved a store not an automobile. However see, *United States v. Medina-Flores*, 477 F.2d 225 (C. A. 10); *United States v. Mulligan*, 488 F. 2d 732 (C.A. 9).

Petitioner clearly has standing if for no other reason than that the United States conceded it by its proof and theory at trial.

2. With standing established the conflicting principles enunciated variously by the circuits require reconciliation and clarification. The instant case is the appropriate vehicle to service that requirement, in that it is part of that controversy as it currently exists. *United States v. Bradshaw*, 515 F.2d 360, presents only the most glaring example of the conflict. The need and importance of eliminating expeditiously the resultant inequities, present and future, generated by the conflict makes it appropriate for this Court to utilize the vehicle at hand to speed to a resolution.

Certiorari, therefore, should be granted.

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September, 1975

Supreme Court, U.S.
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No. 74-1558

In the Supreme Court of the United States

OCTOBER TERM, 1975

RICHARD BECK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
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In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

In seeking certiorari, petitioner contended, and we agreed, that the decision of the Sixth Circuit on the merits in the instant case conflicts with the recent panel opinion of the United States Court of Appeals for the District of Columbia Circuit in *United States* v. *Bradshaw*, 515 F.2d 360. We wish to apprise the Court that on September 9, 1975, on consideration of the United States' petition for rehearing and suggestion for rehearing *en banc*, the District of Columbia Circuit entered an order in *Bradshaw* granting the suggestion for rehearing *en banc* and vacating the opinion and judgment previously filed therein.[1] Accordingly, there is no longer a conflict in the circuits for this Court to resolve.[2] More-

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[1]A copy of the Order is appended hereto.

[2]As we noted in our memorandum (pp. 5-6 and note 5), the Second, Seventh and Ninth Circuits are in agreement with the decision of the court of appeals in the instant case. There are no contrary decisions from other circuits of which we are aware.

over, as we previously demonstrated in our memorandum in opposition, petitioner has no standing to contest the search and seizure at issue here.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
CIRCUIT

September Term, 1974
Criminal 74-239
Filed Sept. 9, 1975
Hugh E. Kline, Clerk

UNITED STATES OF AMERICA,
APPELLANT

v.

MICHAEL J. BRADSHAW AND
VANCE E. ROBINSON

Before: Bazelon, Chief Judge; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges.

ORDER

On consideration of appellant's petition for rehearing and suggestion for rehearing *en banc*, it is

ORDERED by the Court *en banc* that appellant's aforesaid suggestion for rehearing *en banc* is granted, and it is

FURTHER ORDERED by the Court *en banc, sua sponte*, that the opinion and judgment filed herein on June 30, 1975 are hereby vacated.

Per Curiam

For the Court:

HUGH E. KLINE
Clerk

Chief Judge Bazelon and Circuit Judge Wright would deny the suggestion for rehearing *en banc*.